



DONNA G. HATFIELD
(Widow of JAMES E. HATFIELD)

Claimant-Respondent

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HOBET MINING INCORPORATED

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: 11/19/2015

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5488) of Administrative Law Judge Drew A. Swank (the administrative law judge) rendered on

a survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge issued his decision without holding a hearing in this case, and found that employer does not dispute that it is the properly designated responsible operator. The administrative law judge further found: that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death; that claimant filed her survivor's claim after January 1, 2005; and that her claim was pending on or after March 23, 2010. Noting the Board's holding in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014), the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l),² even though the award of benefits in the underlying miner's claim is not yet final. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's finding that employer did not contest its liability as the designated responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing that the administrative law judge should have considered liability a contested issue, but argues that any error is harmless as the record supports his finding that employer is the properly designated responsible operator. Claimant has not participated in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

¹ Claimant is the widow of the miner. The miner's initial claim, filed on April 28, 2003 was denied by the district director on May 11, 2004, because the evidence was insufficient to establish pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. The miner filed his second claim on April 28, 2010. The district director awarded benefits on January 12, 2011, and employer requested a hearing before an administrative law judge. Director's Exhibits 2-26, 28, 29. The miner died on November 9, 2011. Director's Exhibit 7. Claimant filed her survivor's claim on November 17, 2011.

² On March 23, 2010, amendments to the Act, applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that the responsible operator issue was uncontested. Employer argues that the issue of liability was raised “early and often throughout the litigation of both the miner’s claim and the survivor’s claim.” Employer’s Brief at 4. Employer also contends that the district director failed to adequately explain why the miner’s most recent employer, C&F Trucking, was not the designated responsible operator as required by the regulation at 20 C.F.R. §725.495(d).⁴ Employer thus argues that liability must transfer to the Black Lung Disability Trust Fund as a matter of law. Employer’s Brief at 4-8. Some of employer’s arguments have merit.

The record reflects that in its letter responding to the Notice of Claim and the Proposed Decision and Order, employer explicitly stated that it “reserves the right to litigate all issues regarding claimant’s entitlement to benefits and the liability of the operator for the payment of such benefits.” Director’s Exhibits 10, 11. While the district director did not list “responsible operator” as a contested issue on Form CM-1025, employer submitted a November 5, 2013 letter and a November 15, 2013 pre-hearing report to the administrative law judge indicating that it was contesting the responsible operator issue in both the miner’s claim and the survivor’s claim. *See* Employer’s Brief, Exhibits 1 and 2. Consequently, we vacate the administrative law judge’s finding that employer has not contested its identification as the properly designated responsible operator, and remand this case for consideration of the issue. As the regulations require that “[a]ny party to a claim shall have a right to a hearing concerning any contested issue of fact or law unresolved by the district director,” 20 C.F.R. §725.450, and no party filed a motion for summary judgment or agreed to a decision on the record, *see* 20 C.F.R.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner’s coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director’s Exhibit 4.

⁴ The regulations provide that in any case in which the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. If the reasons include the most recent employer’s inability to assume liability for the payment of benefits, the record must also contain a statement that the Office of Workers’ Compensation Programs has no record of insurance coverage for that employer or of authorization to self-insure. In the absence of such a statement, “it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim.” 20 C.F.R. §725.495(d).

§§725.452(c), (d), 725.461(a), the administrative law judge should conduct a hearing on remand consistent with the aforementioned regulatory requirements.⁵ However, as claimant's entitlement to derivative benefits is unchallenged on appeal, we affirm the administrative law judge's award of survivor's benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁵ The Director advises the Board that, contrary to employer's argument, the record does contain the explanation required under 20 C.F.R. §725.495(d), and therefore the administrative law judge's failure to hold a hearing is harmless error. Director's Brief at 6; Director's Exhibit 1. The Board declines to evaluate this evidence or otherwise address the parties' arguments regarding employer's liability in the first instance, as that is within the purview of the administrative law judge.